IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JOHN H. DALTON,	:	
Secretary of the Navy	:	**NO. 95-7940**

MEMORANDUM and ORDER

Norma L. Shapiro, J. **August 11, 1998**

Plaintiff Arthur Jones ("Jones"), a former civilian Naval employee, filed this action against defendant John H. Dalton, Secretary of the Navy (the "Navy"); he alleged certain suspensions and termination of his employment were the result of unlawful race discrimination[1] and retaliation for filing previous discrimination complaints with the Navy, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.[2]

After a seven day trial, the jury returned a verdict in favor of the Navy and against Jones. Jones filed the present motion for a new trial or in the alternative to alter or amend the judgment because: 1) the verdict was against the weight of the evidence; 2) the jury was erroneously instructed; and 3) a question asked by defense counsel that was stricken was unduly

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[1] Jones is black.

[2] Jones also claimed he was denied a performance award and received a "satisfactory" instead of "outstanding" rating because of his race and prior EEO filings; the claims based on the performance award and rating were settled by the parties.

prejudicial. For the reasons stated below, Jones' motion will be denied.

DISCUSSION

I. Standard of Review

A court can grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). A new trial may be granted where "the verdict is contrary to the great weight of the evidence." Roebuck v. Drexel Univ., 852 F.2d 715, 735 (3d Cir. 1988). A new trial also is appropriate if the trial court erred on a matter of law. See Klein v. Hollings, 992 F.2d 1285, 1289-90 (3d Cir. 1993).

The decision to grant or deny a motion for a new trial "is confided almost entirely to the discretion of the district court." Blancha v. Raymark Indus., 972 F.2d 507, 512 (3d Cir. 1992); see Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). However, the court's discretion is more limited when granting a new trial because the jury's verdict is against the weight of the evidence. See Hourston v. Harvlan, Inc., 457 F.2d 1105, 1107 (3d Cir. 1972); Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir. 1972), cert. denied, 364 U.S. 835 (1960). A new trial "cannot be granted ... merely because the court would have weighed the evidence differently and reached a different conclusion." Markovich v. Bell Helicopter Textron, Inc., 805 F.

Supp. 1231, 1235 (E.D. Pa.), aff'd, 977 F.2d 568 (3d Cir. 1992). "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts." Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.), cert. denied, 364 U.S. 835 (1960).

A court analyzing a motion for a new trial need not view the evidence in the light most favorable to the verdict winner. See Magee v. General Motors Corp., 213 F.2d 899, 900 (3d Cir. 1954). If the court finds the verdict is against the great weight of the evidence, the court may grant a new trial. See Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991); New Market Inv. Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909, 917 (E.D. Pa. 1991).

Under Rule 59(e), a "motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment." Fed. R. Civ. P. 59(e). The rule does not specify grounds for altering or amending a judgment, but the motion must involve "reconsideration of matters properly encompassed in a decision on the merits." Osterneck v. Ernst & Whinney, 489 U.S. 169, 174 (1989); see White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451 (1982). Rule 59(e) allows a court to vacate a judgment and enter judgment in favor of the moving party. See Steward v. Atlantci Refining Co., 235 F.2d 570, 571-72 (3d Cir.

1956).

The purpose of a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e) is to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see Ruscavage v. Zuratt, 831 F. Supp. 417, 418 (E.D. Pa. 1993). Motions under Rule 59(e) should be granted sparingly because of the interests in finality and conservation of scarce judicial resources.

II. Retaliation Claim

Jones began working for the Navy at the Philadelphia Naval Shipyard (the "Shipyard") in 1968 as a boiler plant operator. Jones later was promoted to the position of personnel staffing specialist. In November, 1993, Jones was transferred to the Injury Compensation Branch in the Employee/Labor Relations Division at the Shipyard.

While working for the Navy, Jones was supervised by the following individuals: John Conwell ("Conwell"), the Shipyard Director of Human Resources and ultimate authority over Jones; James Dinsmore ("Dinsmore"), in charge of the Employee/Labor Relations Division at the Shipyard and Jones' second level supervisor; Jacqueline Anastasia ("Anastasia"), in charge of the Shipyard's Injury Compensation Branch and Jones' first line supervisor after November, 1993; and Emily Hudson ("Hudson"), head of the Shipyard's Staffing Branch and Jones' first line

supervisor before his transfer to the Injury Compensation Branch. During his years of employment with the Navy, Jones' relationship with his supervisors resulted in numerous complaints of discrimination based on race and sex and claims of retaliation for filing these complaints with the Navy's EEO office; some of the claims were adjudicated by the Merit Systems Protection Board ("MSPB").

This action asserts the Navy suspended and eventually terminated him not for unauthorized absences from work but in retaliation for filing prior EEO Complaints. Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Filing internal grievances or EEO complaints is protected activity under Title VII. See Barber v. CSX Distribution Servs., 68 F.3d 694, 701-02 (3d Cir. 1995); Datis v. Office of the Attorney General, No. 96-6969, 1998 WL 42267, at *7 (E.D. Pa. Jan. 16, 1998); Cooper-Nicholas v. City of Chester, No. 95-6493, 1997 WL 799443, at *5 (E.D. Pa. Dec. 30, 1997).

To show that adverse employment actions were retaliatory and any other justifications were pretextual, Jones had to prove: 1) he was engaged in protected activity; 2) he was suspended or discharged subsequent to or contemporaneously with such activity;

and 3) a causal link existed between the protected activity and the suspensions and discharge. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997); Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir.), cert. denied, 502 U.S. 940 (1991); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990).

Jones established a prima facie case of retaliation; the burden of production then shifted to the Navy to "articulate some legitimate, non-discriminatory reason" for the suspensions and termination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "The defendant's burden at this stage is relatively light: it is satisfied if the defendant articulates any legitimate reason for the discharge; the defendant need not prove that the articulated reason actually motivated the discharge." Woodson, 109 F.3d at 920 n.2. The presumption of discrimination then drops, and plaintiff assumes the burden of proof "both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 512, 519 (1993) ("It is not enough ... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.").

The Navy offered evidence that Jones abused his sick leave and failed adequately to document his claims of medical necessity. The Navy introduced evidence that Jones' requests for

sick leave often coincided with a weekend. There was evidence that once when Jones refused to report for work, he spent the day trying to repair his automobile engine although he had been ordered to report to work by public transportation.

The ultimate burden of proof was on Jones to establish the Navy's justifications for the suspensions and terminations were false and Dinsmore and Conwell were actually motivated by retaliatory motives.

All the evidence of Dinsmore's and Conwell's reasons for suspending and firing Jones must be considered in the context of the entire picture of Jones' employment history. See Andrews v. City of Phila., 895 F.2d 1469, 1484 (3d Cir. 1990). Conwell and Dinsmore testified the Shipyard was in the midst of two major tasks during 1993 and 1994: completion of the U.S.S. Kennedy refurbishing and preparation for the Shipyard closing. It was necessary for the workforce to work long hours and weekends. (N.T. 4/27/98 at 102, 134-35; N.T. 4/29/98 at 26-28, 63-64). Dinsmore stated that at "a moment in the Shipyard's history when we needed everybody available, this was an employee who was just not willing to come to work." (N.T. 4/27/98 at 126). Conwell testified Jones was "an employee ... very visibly refusing to come to work these long hours." (N.T. 4/29/98 at 63-64).

Management was concerned with sick leave abuse; officials feared that the impending closure of the base would tempt

employees to use sick leave even though they were not ill. Controlling sick leave usage was important to the concurrent efforts to refurbish the Kennedy and continue downsizing. (N.T. 4/27/98 at 135-39; N.T. 4/29/98 at 28-31).

Conwell and Dinsmore testified they were aware of Jones' pattern of leave use when he was first suspended and then terminated. Not only was his leave use excessive and often on either side of a weekend, but also his failure to give them adequate notice of his absences imposed a "double burden": they lost Jones' services for the day and were unable to reassign his work to others. (N.T. 4/27/98 at 107-26; N.T. 4/28/98 at 68, 126; N.T. 4/29/98 at 40). Dinsmore testified that in 1991, Jones took 79% of his sick leave next to a weekend and was out 35.4% of work days. (N.T. 4/27/98 at 114-15). In 1992, 77% of Jones' sick leave bordered a weekend and he was out 32.1% of work days. (N.T. 4/27/98 at 117-18). In 1993, 88% of Jones' sick leave was before or after a weekend and he was absent 42% of work days. (N.T. 4/27/98 at 120-21). In 1994, the year of Jones' termination, he was absent 44% of work days. (N.T. 4/27/98 at 124-26). Dinsmore found this pattern of absences was "deplorable." (N.T. 4/27/98 at 125).

Dinsmore testified he did not believe Jones took Shipyard discipline seriously, and that was a factor in his recommendations first to suspend and then to fire Jones.

Dinsmore believed Jones told a co-worker his leave philosophy was "to push the envelope, and when he's in trouble, he goes into the front office and cuts himself a deal with the personnel officer." (N.T. 4/27/98 at 156-57).

Jones testified he injured his back when he was hit with a baseball bat around 1980 and his back bothered him ever since. (N.T. 4/21/98 at 72). Anastasia, one of Jones' supervisors, testified Jones told her of his back problems and they discussed ways they both dealt with their back conditions. (N.T. 4/29/98 at 145). After each absence attributed to back pain, Jones presented medical documentation to support his claim.

Dinsmore, as administrator of the sick leave plan, had discretion in determining whether medical documentation was sufficient for approved leave. The sick leave process was "not a matter of submitting that form, checking this block. The overall obligation of the leave administrator is to ascertain a sufficient quantity or quality of medical information that leaves it clear that the employee was incapacitated for duty on a given day. So it allows some discretion and some flexibility in exercising that judgment." (N.T. 4/27/98 at 146). Jones did not make any request for a special chair, keyboard, foot rest or other accommodation, other than a handicapped parking spot in June, 1994. Jones never complained of back pain to Conwell or Dinsmore while working, (N.T. 4/28/98 at 3-4, 40; N.T. 4/29/98 at

32-33); they did not believe Jones' subjective complaints of pain after his absences.

In the months leading to Jones' first suspension in February, 1994, he was placed on a letter of requirement by Hudson in August, 1993. The letter required Jones to provide adequate supporting documentation each time he sought sick leave. (N.T. 4/27/98 at 142). Jones took sick leave from October 12 through 15, 1993, immediately after Columbus Day. To support his claim for leave, Jones provided a leave slip stating simply: "low back pain." Jones took sick leave again on November 12, 1993, immediately after Veterans Day. The medical documentation provided no information not contained in the October leave slip, and Jones was marked AWOL.

Jones was suspended for one day in February, 1994, after being absent on sick leave from January 3 through 5, 1994, immediately following New Year's Day. This was the third occasion since October, 1993, that Jones had taken sick leave after a holiday weekend while on a letter of requirement. Jones had submitted medical documentation that was vague and listed only "low back pain," without any specific diagnosis. The medical prescriptions Jones submitted were filled several weeks after the alleged incapacitating back pain. Jones stated his medical condition was so well established that he could get a medical certificate over the telephone without even seeing his

doctor. (N.T. 4/28/98 at 13-15; Exs. P-39-17 through P-39-19). Conwell and Dinsmore suspected Jones was claiming back pain as a pretext for extending holiday weekends.

The jury's conclusion that Jones was not suspended for retaliatory reasons was not irrational or against the great weight of the evidence. "[T]he mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." Robinson, 120 F.3d at 1302; see Delli Santi v. CNA Ins. Co., 88 F.3d 192, 199 n.10 (3d Cir. 1996); Valentin v. Crozer-Chester Med. Ctr., 986 F. Supp. 292, 304 (E.D. Pa. 1997) (Shapiro, J.).

Even though Jones was abusing his sick leave, Dinsmore rescinded the August, 1993 letter of requirement in February, 1994. Jones was then absent from March 28 through April 1, 1994. Because the absence was greater than three days, Jones was required to submit medical documentation supporting his claim. The doctor's notes submitted by Jones recited the prior description of low back pain and none indicated Jones had actually been examined by a doctor who diagnosed a cause for the alleged pain. One of the notes stated an x-ray showed no "osseus joint pathology," which caused Dinsmore to believe there was no underlying physiological cause for the alleged back pain. (N.T. 4/27/98 at 64-73; N.T. 4/28/98 at 20; Ex. G-29; Ex. G-30; Ex. G-

31). Conwell testified he approved a five day suspension because he found this absence to be further evidence of leave abuse and Jones did not respond to Dinsmore's proposed suspension by offering further evidence in support of his alleged back pain. (N.T. 4/29/98 at 51-52). Based on this evidence, the jury could rationally find the five day suspension in May, 1994 was not a retaliatory act for Jones' EEO filings; its verdict was not against the great weight of the evidence.

Jones was absent from May 23 through 25, 1994. Dinsmore testified that upon Jones' return to work, he provided a medical note that was indistinguishable from the earlier, vague notes. The note did not provide a verifiable condition and appeared to be based on Jones' subjective complaints alone. Conwell stated he was looking for "any physical condition which causes pain," but Jones did not provide that information. (N.T. 4/29/98 at 54-56). Jones submitted various documents for Conwell's review; many of them recited alleged regulatory violations being committed by Dinsmore and Conwell. Jones provided a letter from a Dr. Bromberg, an orthopaedic specialist, who saw Jones on June 1, 1994, one week after the absence. Dr. Bromberg stated Jones reported back pain since 1986 (not 1980, when Jones claims he was hit by a baseball bat), but not that he had seen an orthopaedic doctor prior to June, 1994. Conwell concluded that Jones was using his bad back as an excuse to abuse sick leave.

Dinsmore proposed Jones' removal after Jones left his work site without permission on June 13, 1994. Jones had informed a co-worker but not his superiors where he was going. He was away for one and one-half hours while talking with his EEO counselor and his representative in a personal disciplinary matter. (N.T. 4/28/98 at 30-31). Dinsmore testified that it was standard shipyard policy to seek permission from one's superior before leaving the job site. (N.T. 4/28/98 at 31). Dinsmore stated he had warned Jones he needed permission before leaving his station in February, 1994 when Jones had left work and walked over a mile to deliver personal papers instead of using the Shipyard's internal mail system. (N.T. 4/28/98 at 31-2).

Conwell testified he considered Jones' absence from his work station an "egregious incident," (N.T. 4/29/98 at 58), but in recognition of Jones' years of Navy service, decided not to terminate but to suspend him for thirty days. The jury's verdict that the thirty day suspension was not retaliatory is not against the great weight of the evidence.

Conwell directed his secretary to inform Jones to report to him immediately upon return from the thirty day suspension. However, Jones reported to the infirmary for back problems instead and was absent from work for another three days. Dinsmore proposed Jones' removal because he was absent for an additional three days upon returning to work after his one month

suspension. Dinsmore found the timing of the sick leave suspicious and the medical note still did not provide any information as to the cause of the alleged back pain. (N.T. 4/28/98 at 36-41). Dinsmore found Jones' behavior to be "a sad repetition of what had taken place up to that point." (N.T. 4/28/98 at 36).

Dinsmore also proposed Jones' removal because Jones failed to report to work on September 29, 1994. Jones stated his automobile failed to operate; Dinsmore testified he instructed Jones' supervisor, Jordan, to order him to come to work by public transportation or be marked AWOL for the day. (N.T. 4/27/98 at 94; N.T. 4/28/98 at 41). Jones admitted he knew it was possible Dinsmore would not approve his absence and mark him AWOL. (N.T. 4/22/98 at 49, 162). Jordan testified he did tell Jones to report to work that day, (N.T. 4/29/98 at 29), and when Jordan warned Jones he would be marked AWOL, Jones replied it was "no big thing, that is standard operating procedure for me and I continue to work on the car." (N.T. 4/22/98 at 162).

Dinsmore considered Jones' refusal to report to work to work on his automobile to be the "final repudiation of his obligations to the shipyard." (N.T. 4/28/98 at 42). He testified Jones' absenteeism was having an adverse effect on morale in the Shipyard and was affecting the timely completion of projects to which Jones was assigned. Therefore, Dinsmore proposed to fire

Jones. (N.T. 4/27/98 at 102-03; N.T. 4/28/98 at 44). Conwell then asked three personnel specialists from the Office of Civilian Personnel Management to review Jones' situation. They all agreed Jones should be removed before Conwell fired Jones. (N.T. 4/29/98 at 63-65). The jury's verdict that the Navy fired Jones for reasons other than retaliation for his EEO activity is not contrary to the great weight of the evidence.

The issue was not whether Jones had disabling back pain as he claimed or whether his doctor's diagnoses and/or treatment were adequate; the only issue was whether Jones was suspended or fired in retaliation for his complaints of discrimination and retaliation. A fact finder could have found that Jones was repeatedly suspended and eventually fired in retaliation for filing numerous EEO complaints against Dinsmore, Conwell and many others, but the jury verdict that the Navy did not retaliate against him in violation of Title VII was not against the great weight of the evidence.

III. Racial Discrimination

Jones also alleged the Navy suspended and terminated him because of his race. Title VII provides: "It shall be an unlawful employment practice for an employer-- (1) to ... discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1). To establish a prima facie case of intentional discrimination, a plaintiff must prove: 1) he was a member of a protected class; 2) he was qualified for the job; and 3) he was suspended or discharged while other employees not in his protected class were retained. See Jalil, 873 F.2d at 708. Jones belonged to a protected class, and, apart from his absences, he was qualified for his jobs.

Jones argues Conwell treated Karen Jenks ("Jenks"), a white employee, more favorably even though her sick leave record was as poor as his, and the different treatment of this similarly situated co-worker established a prima facie case of racial discrimination entitling Jones to judgment in his favor.

Evidence of more favorable treatment to one co-worker may not be sufficient to establish a prima facie case of race discrimination. See Simpson v. Kay, 142 F.3d 639, 645 (3d Cir. 1998). "This is not to say that evidence of the more favorable treatment of a single member of a non-protected group is never relevant, but rather that the evidence can not be viewed in a vacuum." Id.; see Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 539 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993).

Conwell did counsel Jenks on her leave usage, but did not issue her a letter of requirement, suspend or terminate her for

excessive sick leave. Conwell testified he treated Jenks differently because he believed her claims of a thyroid condition and digestive problems. Conwell had witnessed Jenks burst through his office to rush to the bathroom to vomit and had observed her throat swell up like a "bullfrog." (N.T. 4/29/98 at 20-21). Because Conwell believed Jenks' claims of disability, he did not put her on a letter of requirement or review her doctor's notes. The Navy offered a non-discriminatory justification for treating Jenks and Jones differently. The jury's decision to credit Conwell's explanation was not against the great weight of the evidence; the verdict on racial discrimination will not be overturned.

IV. Jury Instructions

Jones has raised two challenges to the jury instructions. First, he argues the court's instruction on the use of exhibits as direct evidence was misleading. Second, he claims the court did not make clear that the jury could find for the plaintiff if he established a prima facie case and the jury disbelieved the Navy's proffered reasons for the suspensions and termination.

Jones failed to raise either of these objections at trial. "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P.

51. A party waives objections to jury instructions not raised at trial. See Neely v. Club Med Management Servs., Inc., 63 F.3d 166, 200 (3d Cir. 1995) (in banc); Grace v. Mauser-Werke GMBH, 700 F. Supp. 1383, 1388-89 (E.D. Pa. 1988).

At the conclusion of the jury charge, the court asked plaintiff's counsel, Rosemarie Rhodes, Esq. ("Rhodes") if she had any objections to the charge. Rhodes asked for clarification of the word "more" in the charge on the meaning of preponderance of the evidence. The court asked if Rhodes had "anything else," and Rhodes replied, "No. That's it." (N.T. 5/4/98 at 80-81). Therefore, the objections now made were waived.

Jones argues the waiver is excused because the instructions were plain error. See Walters v. Mintec/Int'l, 758 F.2d 73, 76 (3d Cir. 1985); Jackson & Coker, Inc. v. Lynam, 840 F. Supp. 1040, 1048 (E.D. Pa. 1993), aff'd, 31 F.3d 1172 (1994). Plain error is one that is "fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and our failure to consider the error would result in a miscarriage of justice." Fashauer v. New Jersey Transit Rail Operators, 57 F.3d 1269, 1289 (3d Cir. 1995).

Jones argues the court should have included an instruction on the relevance of exhibits when offering the charge on direct and circumstantial evidence. Because plaintiff's case was based

in part on exhibits, such as doctor's certificates, Shipyard instructions and Jones' history of leave usage, Jones argues the court should have instructed the jury that the exhibits themselves were direct evidence. Specifically, Jones claims the court should have given the following instruction: "Direct evidence may also be in the form of an exhibit, when the fact in question is its existence or condition." Pltff.'s Brief at 18.

"Direct evidence is evidence that proves an ultimate fact in the case without any process of inference, save ... the inferences of credibility." Woodson, 109 F.3d at 930. None of the exhibits provided direct evidence of the ultimate fact at issue in this case: whether Conwell and Dinsmore suspended and fired Jones because of his race or in retaliation for EEO activities. The exhibits provided circumstantial evidence from which the jury could have inferred the Navy officials' motivations. It was not an error not to inform the jury they could consider the exhibits as direct evidence when the exhibits were not, in fact, direct evidence.

The court instructed the jury that the evidence included "all the exhibits that were received in evidence, regardless of which side introduced them." (N.T. 5/4/98 at 61). This was sufficient in the absence of a request for a more specific charge before the jury began its deliberations. Jones has shown no error, much less plain error, excusing his failure to object to

the charge at trial.

Jones also argues the court's instruction on the plaintiff's burden of proof was confusing. "The fact finder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." St. Mary's Honor Ctr., 509 U.S. at 511.

The court instructed the jury that they could find the Navy's proffered reasons were pretextual.

> Now, the defendant has produced evidence of a reason other than race, this abuse of sick leave, and so the issue for you will be has the plaintiff proved that the reason that the defendants gave wasn't the true reason for the plaintiff's discharge. We sometimes say is it a pretext, something thrown out to sort of hide the real reason. So the question is, is it more likely than not that the plaintiff's race is what caused him to be discharged.

(N.T. 5/4/98 at 74). The court continued:

> The issue ... in evaluating this [is] whether they suspended him and removed him because they really believed he was if not either faking his back pain or using it to his advantage not to report to work or whether they were doing it because he was black or in retaliation, finding an excuse because they wanted to get rid of him for filing all these complaints.

(N.T. 5/4/98 at 77).

The court did not explicitly state that the jury's disbelief of defendant's proffered reasons coupled with plaintiff's

establishing a prima facie case would be sufficient to find in favor plaintiff, but the charge makes clear the ultimate question for the jury was whether it believed defendant suspended and fired Jones based on race discrimination or retaliation.

Even if the jury disbelieved the Navy's articulated reasons, it was not required to find in favor of Jones. Jones cannot complain of an "isolated error"; one must "read the jury instructions as a whole." Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 137 (3d Cir. 1997), cert. denied, 118 S. Ct. 1052 (1998). The court instructed the jury not to "single out any one of my instructions, but try to take my instructions as a whole." (N.T. 5/4/98 at 59). The charge as a whole was neither confusing nor erroneous. Plaintiff sought no clarification or correction at the time. Jones is not entitled to a new trial because of the alleged errors in the jury instructions.

V. Defense Counsel's Question to Coradine Myers

During cross-examination of Coradine Myers ("Myers"), defense counsel asked Myers to confirm that plaintiff's counsel also represented her and Gloria Dixon ("Dixon") in other discrimination lawsuits against the Navy. Defense counsel then asked: "Do you all have an agreement to divvy up the proceeds if anybody wins their cases?" (N.T. 4/30/98 at 36). Plaintiff's counsel objected to the question; the court sustained the objection and directed the jury to "disregard that question."

(Id.). Jones now complains that the question misled the jury by implying that "Jones had not won any of his discrimination cases." Pltff.'s Brief at 20. It is unclear how a question concerning an arrangement among three plaintiffs to divide an award to any one of them implied that Jones was unsuccessful in his many administrative complaints to the Navy and in a prior action decided in his favor; it simply implied the witness might be biased in her testimony because of her possible share in any award to Jones.

The court ruled prior to trial that it would not permit questions regarding the outcome of prior EEO complaints and evidence of Jones' prior civil action would be inadmissible. Even if the question were improper, the court sustained plaintiff's objection and directed the jury to disregard the question; that cured any prejudice that might have resulted. The court will not amend the judgment or order a new trial based on a question that was unanswered, ordered to be stricken and disregarded by the jury.

CONCLUSION

Plaintiff's motion for a new trial or to alter or amend the judgment will be denied. Plaintiff has not shown the jury's verdict on the race discrimination and the retaliation claims was against the great weight of the evidence. The charge considered in its entirety was not confusing or erroneous even if plaintiff

had not waived objections to the jury charge. Plaintiff is not entitled to a new trial based on an unanswered question the jury was instructed to disregard. The issues in this case were vigorously disputed and fairly tried by able counsel. There was more than adequate evidence to support the jury's conclusion in favor of defendant. Its verdict should not be set aside because the plaintiff is convinced it should have reached a contrary conclusion and was sure the jury would decide in his favor.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JOHN H. DALTON,	:	
Secretary of the Navy	:	**NO. 95-7940**

ORDER

AND NOW, this 11th day of August, 1998, upon consideration of plaintiff's motion for a new trial or to alter or amend the judgment, plaintiff's addendum in support thereof, defendant's response thereto, plaintiff's reply, and in accordance with the attached Memorandum, it is hereby **ORDERED** that plaintiff's motion for a new trial or to alter or amend the judgment is **DENIED**.

Norma L. Shapiro, J.